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February 18, 2022

The Honorable Kumar Barve
Chair, House Environment
and Transportation Committee
Room 251, House Office Building
Annapolis, MD 21401

The Honorable Luke Clippinger
Chair, House Judiciary Committee
Room 101 House Office Building
Annapolis, MD 20401

RE: HB 0777 – Support

Dear Chair Barve, Chair Clippinger, and Committee Members:

Good afternoon Chairpersons Barve and Clippinger and members of the House Environment and Transportation and Judiciary Committees. I am Professor Thomas W. Mitchell, a law professor at Texas A&M University School of Law. I served as the Reporter (principal drafter) for the Uniform Partition of Heirs Property Act (UPHPA). It bears mentioning that I lived and worked in the Washington, D.C. area for nearly ten years beginning in 1987 and during that time attended Howard University School of Law, practiced law at Covington & Burling, and served as a judicial law clerk to Judge Emmet G. Sullivan. Thank you for the opportunity to testify in support of House Bill 777, the Partition of Property Act, which is essentially the Maryland version of the UPHPA, which extends the provisions of the UPHPA to all tenancy-in-common property rather than solely heirs' property, which is one subset of tenancy-in-common ownership.

At its core, the UPHPA is a uniform act that addresses the devastating impact of the application in many cases of an arcane property law known as partition law that has resulted in substantial property loss among many so-called heirs' property owners and the stripping of generational wealth from these families. Some have described partition law abuse of heirs' property owners as representing the greatest civil rights violation that hardly anyone knows about in this country. To this end, the negative impact of these court-ordered forced sales throughout the country has contributed to exacerbating the racial wealth gap. The UPHPA significantly enhances the due process and private property rights of vulnerable families who own tenancy-in-common property under default rules that states such as Maryland establish under their intestacy laws, laws that apply when someone dies without having made a will or other estate plan.

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First, it does so by increasing the ability of families to maintain ownership of their property when one of the common owners petitions a court to order a forced sale of the entire property against the wishes of some or all of the other common owners. Second, it does so by protecting the real estate wealth of families in those instances in which a court orders a forced sale of their family property.

Let me describe what constitutes so-called heirs' property. Heirs' property represents a subset of tenancy-in-common property, the most prevalent form of common ownership of real property in the United States. Under a tenancy in common, individual common owners own an undivided fractional interest in the entire property as opposed to owning any particular part of the property. Heirs' property is family-owned, tenancy-in-common property governed by the rules states such as Maryland mandate under intestate succession laws.

Although most heirs' property arises due to the failure of family members to make a will or some other estate plan, sometimes estate planning attorneys unwittingly create heirs' property by drafting simple wills that mimic how property would be transferred under intestate succession laws. Tenancy-in-common property governed by these default rules represents the most unstable form of common real property ownership in the United States, largely (though not exclusively) because of partition law. Partition law makes tenancy-in-common ownership under the default rules very unstable because any one of the cotenants (common owners) can file a partition action requesting a court to order a forced sale of the entire property no matter how small a fractional interest they own and no matter how recently they acquired their interest. Although such property is owned by families of all racial and ethnic groups, heirs' property owners are disproportionately African American and other disadvantaged people of color.

The drafters of the UPHPA recognized that families often value their heirs' property for family heritage, cultural, and, in some instances, historical reasons in addition to valuing it because they can use it to meet their basic housing needs. Many heirs' property owners who lose their property in a partition action experience a substantial reduction in the quality of their housing and some have even ended up homeless. In addition, such property often constitutes the largest economic asset for otherwise low-income, low-wealth families who own such property.

Further, tenancy-in-common and heirs' property ownership in particular is no trivial matter. About half of adult Americans do not have a will or estate plan, which means that those property-owning Americans who die without an estate plan will have their property transferred to their heirs under the laws of intestacy. Given all the other racial gaps in our country, perhaps it is not surprising that there is a massive – if little known – racial will-making gap in the United States. According to one national study, while 64% of white Americans have a will only 24% of African Americans have a will. Perhaps more surprisingly, only 32% of the most highly educated African Americans in the study – those with at least a college degree – had made a will in contrast to 57% of the least educated white Americans (those without a high school degree). The will-making rates for LatinX adults are very similar to the rates for African Americans.

Generational wealth almost always is lost as a result of court-ordered partition sales. This occurs because the judicial, auction sales used to sell such tenancy-in-common property usually yield prices well below market value and even fire sales prices. The partition sales yield below-market value prices because the procedures used for such forced sales are not designed to yield a market value price as they incorporate none of the features economists recognize as being essential for a sale to yield a market value price. The sales are ordered with scant notice to the public; potential buyers are not permitted to inspect the property;

and a bidder is not permitted a period of time to seek financing for his or her bid and, therefore, must have substantial cash on hand the day of the auction to acquire the property, something few disadvantaged families have at their disposal.

Although for decades, among the relatively small number of people familiar with the issue, partition law abuse negatively impacting tenancy-in-common property owners was viewed as a problem only impacting African American families who owned property in the rural South, the reality is that the problem is much more universal. To understand why this is the case, one needs to understand the factors that generate tenancy-in-common property in the first instance and that make it an inviting target for those who want to acquire it forcibly. First, the families tend to be "property rich and cash poor" as most family members who own such property are low-income and have little wealth besides their tenancy-in-common property interests. Second, tenancy-in-common property owners typically have had a lack of access to affordable legal services. Third, in part because of the lack of access to legal services and (in some instances) a distrust of the legal system, there has been a low incidence of will-making within families who own heirs' property. Fourth, at the point of its creation and for long periods thereafter, for many families, tenancy-in-common property has typically been property that was not considered prime real estate even though for some racial and ethnic groups, such as for African Americans, families who own any real property have been considered relatively privileged within their particular racial or ethnic groups. Fifth, at some point in time, the property that was not considered particularly valuable experiences a rapid appreciation in its value either because it is newly in the path of development or because it is located in an already developed area that is experiencing gentrification.

Not only do these factors make it clear that tenancy-in-common property ownership is a significant issue among many American families, irrespective of their race or ethnicity, but the factors also make it clear that tenancy-in-common and heirs' property is not a placed based phenomenon restricted to rural places. After being obscured for years, the existence of partition law abuse in cities was laid bare in 2019 by an award-winning investigative report done by a reporter for NY1, a large television station in New York City. The reporter, Lydia Hu, uncovered substantial evidence of partition law abuse in many boroughs of New York city committed by various real estate speculators. These speculators typically would buy out the fractional interests of a small number of family members – targeting families that were African American in each instance – and then use the threat of a ruinous partition action to compel the remaining family members to sell their interests at a steep discount or would file a partition action if they could not compel the other family members to sell. This investigative report served as the catalyst for New York's enactment of the UPHPA in 2019. Similar problems with tenancy-in-common property and partition law have been identified in several other cities, including Atlanta, Boston, and Baltimore.

The UPHPA has three essential pillars that provide tenancy-in-common property owners with enhanced property rights protections, none of which are features of the current partition law in Maryland. First, if any cotenant petitions a court for a court-ordered partition sale, the other cotenants are afforded the right at the beginning of the litigation to buy out the fractional interest of the cotenant that seeks the forced sale. Second, the UPHPA adds substance to the preference most jurisdictions have for a physical division of property in a partition action by using a "totality of the circumstances" test that includes both economic and non-economic factors instead of the economics-only factors most states and jurisdictions use. Third, the UPHPA's default sales procedure is an "open-market sale," which is a procedure designed to mimic a sale between a willing seller and a willing buyer. These sales, which are conducted by court-appointed real estate

brokers who list and market heirs' property that courts order sold just as they list and market properties in their normal inventories, are designed to yield sales price that approximate market value instead of the below-market value sales prices most partition sales under the standard partition laws yield.

The feedback we have received from states where the UPHPA has been the law for a number of years now is that it is working very well and as intended. We have heard that the number of predatory partition actions in states such as Georgia and South Carolina has declined dramatically. In terms of partition actions that have been filed, some cases are settling sooner because some of those who petitioned the court for a sale in the hopes that they could acquire the properties in question for a fire sale price have realized that tenancy-in-common and heirs' property owners who want to maintain ownership of their property or to have it sold for a fair price now have much more leverage. In this vein, it bears mentioning that the actual experience courts have had with the UPHPA in a number of states that have enacted it validates the fiscal impact analysis many state legislatures conducted as part of their consideration of UPHPA bills, analyses that all determined that the UPHPA would have no significant fiscal impact on the court systems in those jurisdictions.

As a result of the open-market sales procedure, we have heard from lawyers in several states that partition sales are yielding substantially higher prices, which is not surprising because real estate economics theory predicts that a sale that mimics a willing seller-willing buyer sale would produce a much higher price than a sale using procedures that have none of the attributes of a sale conducted under market value conditions. In one such case in Texas, a property sold for $2.5 million dollars using the UPHPA's open market sales procedure and the lawyers for both the plaintiffs and defendants in that case agreed that the property would have sold for no more than $1 million dollars had the typical auction sale at the courthouse procedure been used.

The UPHPA represents a great example of what differentially situated stakeholders can do by working together closely to advance the cause of justice and to address a significant source of racial injustice in our legal system. In both the development of the UPHPA and in the efforts to get it enacted into law all over the country, grassroots organizations have worked closely with "grasstops" advocates in a coordinated way. Multisectoral and multiracial coalitions have formed in several jurisdictions to advocate for the UPHPA, including in Virginia which led to the enactment of the UPHPA in Virginia in 2020. This combined work has helped substantially improve an unjust and archaic property law that many had long considered impervious to change in part due to inertia and in part because it was assumed that no legislature would respond to the needs of disadvantaged tenancy-in-common and heirs' property owners because these owners were perceived as lacking sufficient economic and political power.

A tremendous amount of progress has been made over the course of the past ten years in seeking to rectify long ignored injustices tenancy-in-common property owners had been experiencing for many decades, problems that had been hiding in plaining sight during all that time. 18 states and the United States Virgin Islands have enacted the UPHPA into law, including New York and Virginia, states which actually enacted expanded versions of the standard UPHPA much like Maryland's version. 8 states and the District of Columbia have had UPHPA bills introduced in their legislatures in the past year. The 2018 federal Farm Bill includes provisions specifically referencing the UPHPA and providing incentives for states that have not enacted it into law to do so, which has resulted in four state enactments thus far, including most recently in Florida and Mississippi. The Biden-Harris administration's American Rescue Plan that became law last

March includes provisions directing the United States Department of Agriculture to provide funding to address various problems heirs' property owners face. By enacting the UPHPA into law, Maryland could significantly help advance the efforts to promote justice for tenancy-in-common property owners throughout the country and to address one cause of extreme gentrification in the city that has caused real harm to the district's African American community.

For the foregoing reasons, I urge the Committee to report favorably upon the Partition of Property Act, House Bill 777, and I hope Maryland joins the growing number of states and other jurisdictions that have enacted it. I would be pleased to address any questions.

Sincerely,

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Professor and Co-Director, Program in Real Estate and Community Development Law
Texas A&M University School of Law

cc: The Honorable Samuel I. Rosenberg
The Honorable Dana Stein